APPENDIX A

Opinion of Appellate Court

MR. JUSTICE BURKE *Delivered the Opinion of the Court:*

Edward Somerville, hereinafter referred to as defendant, Paul Langusch, Robert Somerville, Gail Somerville, Douglas Aldridge and Leon Arnold were indicted for the crime of armed robbery. (Robert Somerville, Gail Somerville and Paul Langusch were previously tried and found guilty, and their convictions were upheld on appeal. See People v. Somerville, 71 Ill. App. 2d 381.) Defendant was tried alone at a jury trial, was found guilty and was sentenced to a term of ten to twenty years in the State penitentiary. On this appeal he maintains that he was denied a fair trial on the grounds that the State permitted perjured testimony to be heard by the jury, that the trial court improperly allowed a defense witness to be impeached by means of a felony conviction which was too remote in time, and that the same defense witness was improperly impeached by means of a prior misdemeanor conviction.

Robert Olszewski, manager of the Zayre Department Store in Bridgeview, Illinois, testified that on March 23, 1963, robbers took some $22,000 from him at the store and escaped with $13,000 thereof. About 10:00 P.M. on that day Olszewski and assistant store manager Jerry Hayer were in the cash office of the store when Olszewski heard a commotion in the main part of the store. He looked into the store proper and observed an armed man whose head was covered by a hood. Olszewski and Hayer were told to lie on the floor and to remain quiet. The hooded man left and shortly thereafter Olszewski heard gunshots and the crashing of glass. In the store Olszewski found the jani-

tor had been shot. Olszewski recovered a cloth bag in the vestibule of the store containing some of the money taken in the robbery. Next to the bag was found a shoe, and outside the store another shoe was found. Hoods were found in and near the store. Approximately one mile from the store a 1963 dark-colored, four-door Chevrolet automobile was found.

Leon Arnold, the State's principal witness, stated that he was under indictment for the robbery in question. He testified that on the evening of March 23, 1963, he was drinking in various taverns with Douglas Aldridge and saw defendant in one of the taverns. Defendant told Arnold and Aldridge that he "had something good" and that it related to the Zayre Department Store. The three men drove in defendant's automobile to a house in the Blue Island Area where they met with defendant's two brothers, Robert and Gail Somerville, and Paul Langusch. Robert Somerville was a security guard at the Zayre Department Store and Gail Somerville outlined the plan for the robbery of the store. Paul Langusch was told to "pick up a hot car" and left the house.

Arnold testified that Gail Somerville was to drive Robert Somerville's pick-up truck to the department store for use as one of the "get-away cars." Arnold, Aldridge and defendant were to enter the store before it closed and wait in a storeroom until they received a prearranged signal from Langusch. Langusch, parked in the stolen automobile in front of the store, would let the men inside the store know by way of a walkie-talkie when the cashiers had left the store and when the lights were put out. After the robbery, the men were to make their escape in the stolen automobile, which was then to be abandoned, and Gail Somerville was to pick up the men in the truck where they were to hide under mattresses in the rear of the truck.

The men proceeded to the Zayre Department Store, Gail Somerville in the pick-up truck, Langusch in a stolen dark-colored, four-door 1963 Chevrolet, and the rest of the men in defendant's automobile driven by Robert Somerville. Pursuant to the plan, Langusch remained outside the store in the stolen automobile, while defendant, Arnold and Aldridge entered the store, proceeded to the storeroom, donned hoods which they had made for the occasion, and waited for the signal from Langusch.

Arnold testified that after a while, when they had received no signal from Langusch, the three men proceeded into the store where they encountered the janitor. A fight ensued, the janitor was "getting the better" of Arnold and Aldridge, and one of the other men shot him. The money was taken and the three men fled.

Arnold testified he discarded his hood and that he had only one shoe on which he likewise discarded. Both of these items were recovered in the store and were identified by Arnold at the trial as belonging to him. Arnold ran from the store and finally stopped in a prairie on 95th Street near the Starlite drive-in theater where he unexpectedly met Aldridge. Aldridge was also missing a shoe, which was found near the department store and which Arnold identified at the trial as belonging to Aldridge. Aldridge gave Arnold some of the stolen money which he had in a cloth bag and in his pocket and the two men began walking. When they neared the Southwest Highway, Arnold made a telephone call and the two men were picked up by Gail Somerville about 8:00 on the morning of March 24th.

Arnold, Aldridge and Gail Somerville drove to an unidentified woman's house on 99th Street where they met with Langusch, Robert Somerville, defendant, and defen-

dant's third brother, Donald Somerville, a Chicago policeman. While the woman doctored Arnold and Aldridge's feet, the money from the robbery was counted and split between the participants of the robbery. The men each paid the woman $50 and left.

In response to questioning by the prosecuting attorney, Arnold stated that he was never convicted of a felony, that an indictment for aggravated battery was pending against him for a matter occurring after the robbery in question, that he was made no promises of leniency by the State's Attorney's office nor by any other police agency in return for his testimony and that the reason he was testifying against his confederates was because he did not want to go to the penitentiary.

Mrs. Beatrice Rahn testified that she lived Kitty-corner from the Somerville residence in Worth Township. She stated that the Somervilles owned different trucks at various times, that she saw a truck in the Somerville driveway on the afternoon of March 23, 1963, and that Gail Somerville and Paul Langusch were near the truck that day. The witness further testified that she noticed the truck leave the Somerville driveway about 9:30 P.M. on March 23rd because the truck's lights shined into her front window as it pulled out of the driveway and that she heard it return about 11:00 that same night. Mrs. Rahn also observed two mattresses on the rear of the truck the following morning.

Mrs. Judy Stark testified that she was employed at the Zayre Department Store and that when she left the store about 10:10 P.M. on March 23, 1963, she walked toward a dark-colored 1963 Chevrolet automobile which she thought belonged to Jerry Hayer and observed a person sitting in the automobile who resembled Robert Olszewski.

She observed the person from a few feet away and the person turned away. Mrs. Stark later identified that person as Paul Langusch from numerous photographs shown to her and again in police line-up in February of 1964.

Officer John Browne testified that he arrested Aldridge on April 29, 1963, in Blue Island and that at that time he recovered a walkie-talkie from Aldridge's automobile, previously identified at the trial by Arnold as one of the walkie-talkies used in the robbery. The officer further stated that Arnold and Gale Somerville were also arrested at that time. FBI agent Robert Matheson testified he arrested defendant on January 26, 1965, in a motel in Los Angeles, California, living under the name of James Baker.

A defense of alibi was raised by defendant. He also attempted to show by evidence that Leon Arnold testified as he did because of a grudge Arnold held against defendant for an incident occurring in June of 1963. Defendant's alibi witnesses, John Johnson, Thomas Smith and Mrs. Delores Smith, testified substantially that defendant and they were in a restaurant in Oak Forest, Illinois, at the time the robbery was being committed, and that defendant did not leave the restaurant until 11:30 P.M. or later on the date in question.

Donald Allen Somerville, defendant's father, testified that on June 1, 1963, he observed Leon Arnold outside the home of defendant's brother, Donald, accusing defendant of having taken Arnold's wife to a party. The witness testified there was a scuffle, that Arnold was struck in the face and that Arnold told defendant, "I will get even with you if it takes the rest of my life." Mr. Somerville testifield further that he saw defendant outside a courtroom in Florida on April 29, 1964, and that defendant had stated that the judge freed him. The witness stated that Leon

Arnold, who was also present, then stated to a nearby deputy sheriff, "What the hell kind of law do you have here? I came all the way, 1,500 miles to get even with that guy and he was turned free."

On cross-examination of the witness the prosecuting attorney brought out that the witness was convicted in 1945 of burglary, that he pleaded guilty to the charge and that he received a sentence of 5 years probation; he further testified he also received 90 days in the county jail for breaking a window.

Mrs. Mary Somerville, defendant's mother, testified she overheard Leon Arnold say to a Fort Lauderdale sheriff, "What the hell. I come all the way down here to get that guy because he's going—and the judge wouldn't free—and the judge freed the guy."

Defendant testified in his own behalf and denied having taken any part in the Zayre Department Store robbery. He testified among other things, that on June 1, 1963, he was at a party at his brother's house when Leon Arnold drove up in an automobile and shouted obscene words at him. Arnold was struck in the face and threatened to get even with defendant. Defendant further testified he moved to Florida in 1964 and later learned that he was under indictment for the Zayre Department Store robbery and that he went to court in Florida in regard to the matter. After having received permission from the judge to leave and upon leaving the courthouse, he overheard Arnold state to a sheriff's police officer that he (Arnold) travelled 1,500 miles to get even with defendant and that defendant was freed. Defendant further testified that he then moved to California and lived under an assumed name until he was arrested and brought back to Illinois.

Leon Arnold testified in rebuttal and denied having had a fight with defendant. Mary Campbell, Arnold's common-in-law wife, testified that she did not attend a party with defendant and further denied knowing defendant.

Defendant's first contention, that he was convicted as the result of perjured testimony, is without merit. The contention is based upon the fact that Leon Arnold testified at the trial in the instant cause that he was given no promises by the State's Attorney's office or any other police agency, whereas at a trial involving Donald Somerville and Marjorie Kullerstrand some five months later, when testifying to matters relating to the instant cause in response to questions propounded by the same attorney who prosecuted the instant cause, the following testimony was elicited from Arnold:

"Q. Did the sheriff's police tell you that you would probably benefit by telling the truth?

A. I expected leniency if that's what you mean.

Q. You expected leniency?

A. Yes, sir.

Q. From the sheriff's police?

A. Yes, sir.

Q. You expected the sheriff's police to be able to help you, is that right?

A. Yes, sir.

Q. And he told you to come to the State's Attorney's office?

A. Yes, sir.

Q. And is that the first time you met Mr. Tuite (prosecuting attorney)?

A. Yes, sir."

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"Q. And did Mr. Tuite tell you that it would benefit you to tell the truth?

A. I don't understand what you mean.

Q. You are having difficulty?

A. Yes.

Q. Did you express your feelings that you wanted to help yourself to Mr. Tuite?

A. Yes.

Q. Did he say he could help you?

A. He said I could probably get leniency.

Q. He told you, you would get leniency, is that right, and you expect leniency, is that right?

A. No, I don't expect leniency, I hope for it."

Defendant is in error in attempting to equate the words "He said I could probably get leniency" with the making of a definite promise. It is clear that leniency was a mere expectation on Arnold's part; there is not one word in the above testimony of any promise having been made that Arnold would get leniency if he testified for the State. Furthermore, there is no indication that the conversation with regard to leniency between Arnold and the prosecuting attorney did not occur within the five months between the trial in the instant cause and the trial from which the above testimony was excerpted. It should also be noted that the question of leniency goes to the credibility of Arnold as a witness and that the jury was presented with a great deal of evidence that Arnold testified as he did due to a grudge he held against defendant; the jury nevertheless chose to believe Arnold's testimony which was corroborated by the other witnesses for the State.

The case of Napue v. Illinois, 360 U.S. 264, and People v. Agnello, 35 Ill. 2d 611, so heavily relied upon by defendant in support of this position are not in point. In each

of these cases the witness testified there had been no promise made to him by the State in consideration for his evidence, whereas there had in fact been a promise of consideration made and the prosecuting attorney knew of the promise during the questioning. This is not the situation in the instant cause.

Defendant next contends that Donald Allen Somerville was impeached by means of a felony conviction too remote in time to have any bearing on his truth and veracity. In support of this position he cites the case of People v. Henneman, 323 Ill. App. 124, which holds that a conviction for a crime which occurred when the witness was 18 years of age some 21 years prior to the time the conviction was used to impeach the witness was too remote under the circumstances of the case. In view of the later cases of People v. Buford, 396 Ill. 158, which holds that the statute fixes no limitation as to the time when a prior conviction may be utilized to affect the credibility of a witness, and People v. Brown, 69 Ill. App. 2d 212, which comments on both the Buford and Henneman cases and which also holds that the statute prescribes no such time limit defendant's contention in this regard cannot be sustained.

Defendant's final contention is that the same witness, Donald Allen Somerville, was improperly impeached by way of evidence of a conviction of a misdemeanor in the form of a conviction for breaking a window and a sentence therefore of 90 days in the county jail. This contention is likewise untenable. In the first place, the testimony elicited from the witness in this regard immediately followed his testimony concerning the conviction for burglary, to which charge he pleaded guilty and for which he received 5 years probation. The prosecuting attorney then asked, "Aside from receiving five years' probation, you also received

time in the County Jail?" The witness answered, "Ninety days for breaking a window." It is difficult to determine whether the 90 days sentence was imposed as a part of the burglary judgment, or whether it related to some other misdemeanor offense. The evidence pertaining to the breaking of the window was cumulative and its admission into evidence was not prejudicial error. Although this matter is advanced as error on this appeal, no objection was raised below with regard to the admission of the evidence relating to the felony conviction or the evidence about the 90 day sentence. Defendant cannot now be heard to complain in this regard.

We do not find any reversible error. Therefore, the judgment is affirmed.

AFFIRMED.

LYONS, *P.J.*, and BRYANT, *J.* concur.

APPENDIX B

Judgment Order of the Appellate Court of Illinois

The judgment of the Circuit Court of Cook County is affirmed.